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IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted]

SAMUEL DODD WILLIAMSON,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal, Second Appellate District, Division Two, State of California.

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Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal, Second Appellate District, Division Two, State of California.

Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal, Second Appellate District, Division Two, State of California, entered in the above-entitled case on September 26, 1962.

Opinions Below.

The opinion of the District Court of Appeal, Second Appellate District, Division Two, State of California [C. T. 4][1] is reported in 207 A. C. A. 885, 24 Cal.

[1]The reference "C. T." is to the transcript of the entire record prepared and certified by the clerk of the court below. The said record contains, among other things, the record on appeal in the Appellate Department, separately paged, and referred to in this petition as "A. T.", and the reporter's transcript of the trial proceedings, also separately paged, referred to

Rptr. 734. A copy of the said opinion is attached hereto as Appendix A.

The opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles [A. T. 202-205] is unreported. A copy of the said opinion is attached as Appendix B.

Jurisdiction.

From a judgment of conviction rendered by the Municipal Court of Los Cerritos Judicial District in the County of Los Angeles, State of California, petitioner duly prosecuted an appeal to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. By opinion and judgment [A. T. 202-205; Appendix B] entered on July 18, 1962, the said Appellate Department reversed the said judgment of conviction. However, on the same day, the said Appellate Department on its own motion certified the cause to the District Court of Appeal because the appeal was deemed to involve "important questions of law which should be settled" [A. T. 207]. Calif. Penal Code 1471; Calif. Rules of Court, Appellate Rules, *Rules on Transfer of Municipal and Justice Court Appeals*,[2] Rule 63. A copy of the said Order Certifying Cause to District Court of Appeal is attached hereto as Appendix C.

On August 6, 1962, the District Court of Appeal, Second Appellate District, Division Two, State of Cali-

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in this petition as "R. T." The clerk below has included the remaining separate original documents in the transcript without pagination, since the documents are separately designated and readily ascertainable.

[2]Adopted by the Judicial Council of the State of California, effective January 2, 1962.

fornia, finding good cause therefore, ordered petitioner's case transferred to it for hearing and decision [C. T. 3.] Calif. Penal Code 1471; Calif. Rules of Court, Appellate Rules, *Rules on Transfer of Municipal and Justice Court of Appeals*, Rule 62. A copy of the said Order on Transfer is attached hereto as Appendix D.

The judgment of the District Court of Appeal, Second Appellate District, Division Two, State of California (Appendix A) affirming petitioner's conviction, was dated and entered on September 26, 1962. A due and timely petition for rehearing [C. T. 5] was denied on October 24, 1962 [C. T. 6].

A due and timely petition for hearing in the Supreme Court of the State of California [C. T. 7] was denied on November 21, 1962 without opinion [C. T. 8].[3] By order of Mr. Chief Justice Warren dated February 7, 1963, the time to file this petition for writ of certiorari was extended to and including March 21, 1963.

The jurisdiction of this Court is invoked, under 28 U. S. C. 1257(3) since the validity of a state statute on grounds of repugnancy to the Constitution of the United States was and is drawn in question and rights, privileges and immunities were and are specially set up and claimed under the Constitution of the United States.

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[3]The District Court of Appeal, Second Appellate District, Division Two, State of California became, therefore, the highest court of the State in which a decision could be had. California Constitution, Article VI, §§4, 4f, 4d, 4e; California Penal Code 1471; California Rules of Court, *Appellate Rules*, Rules 24, 27, 28, 61-68; *Talley v. California*, 362 U. S. 60, 62; *American Railway Express Co. v. Levee*, 263 U. S. 19, 20-21.

Questions Presented.

1. Whether the construction of California Penal Code 311(3), as applied to petitioner, to mean that a bookseller's good faith belief that a book is not obscene is not a defense in an obscenity prosecution for the sale of the book, violates the free speech and press and due process provisions of the First and Fourteenth Amendments.

2. Whether the construction of California Penal Code 311(3), as applied to petitioner, to mean that it is not necessary to prove that the bookseller knew that a book was obscene in an obscenity prosecution for the sale of the book, violates the free speech and press and due process provisions of the First and Fourteenth amendments.

3. Whether the construction of California Penal Code 311(3), as applied to petitioner, to mean that in an obscenity prosecution a bookseller may be convicted solely upon proof that the bookseller knew the contents of the book, violates the free speech and press and due process provisions of the First and Fourteenth Amendments.

4. Whether the construction of California Penal Code 311(3), as applied to petitioner, to effectively exclude from the jury's consideration in an obscenity prosecution all evidence offered on behalf of the bookseller to show that the book in question was being sold by other book dealers and that the public library had copies of the book and literary critics praised it as a work of literary merit and that other comparable books were being sold, violates the free speech and press and due process provisions of the First and Fourteenth Amendments.

5. Whether the construction of California Penal Code 311(3), as applied to petitioner, to permit the conviction of a bookseller in an obscenity prosecution upon the testimony of concededly unqualified persons that the book in question fell below community standards by describing conduct disapproved by a majority of the people in the community, violates the free speech and press and due process provisions of the Fourteenth Amendment.

6. Whether the construction of California Penal Code 311(3), as applied to petitioner, to punish the sale of a book deemed offensive to the community standards of "the southeastern portion of Los Angeles County" violates the free speech and press and due process provisions of the First and Fourteenth Amendments.

7. Whether the construction of California Penal Code 311(3), as applied to petitioner, to permit the conviction of a bookseller in an obscenity prosecution without evidence that the book in question exceeds customary limits of candor in depiction or representation of sex or has any tendency to corrupt or deprave the average person or appeal to his prurient interest, and the only competent evidence showing that the book does not exceed such limits and has no such corruptive effect or appeal, violates the free speech and press and due process provisions of the First and Fourteenth Amendments.

8. Whether the construction of California Penal Code 311(3), as applied to petitioner, to punish the sale of the book *Fear of Incest* by March Hastings, violates the free speech and press and due process provisions of the First and Fourteenth Amendments.

9. Whether the construction of California Penal Code 311(3), as applied to petitioner, to permit the conviction of a bookseller in an obscenity prosecution under admittedly erroneous instructions given to the jury by the trial court on the meaning of obscenity, and after refusal to instruct the jury at petitioner's request on the admittedly correct definition of obscenity under the applicable law, violates the free speech and press and due process provisions of the First and Fourteenth Amendments.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States, the pertinent provisions of California Penal Code 311 prior to September 15, 1961, and the provisions of California Penal Code 311, effective September 15, 1961 (Calif. Stats. 1961, c. 2147, p. 4427) are set forth in Appendix E attached hereto.

Statement of the Case.

By complaint, as amended [A. T. 7-9] dated May 15, 1961, the petitioner, a book seller [R. T. 215] was charged with a violation of California Penal Code 311(3). It was alleged that on or about May 12, 1961, petitioner wilfully and lewdly sold a book entitled "Fear of Incest" by March Hastings in the Los Cerritos Judicial District in the City of Lakewood and County of Los Angeles, State of California. The cause came on for trial before Honorable John C. Landis, a Judge of the Municipal Court of Los Cerritos Judicial District in the County of Los Angeles, State of California, and a jury [A. T. 23].

How Federal Questions Are Presented.

(a) At the trial, the prosecutor introduced the book into evidence [Peo. Ex. 1; R. T. 187], and read its contents to the jury [R. T. 189-192]. With respect to the said book, petitioner testified that he did not know that the book was obscene nor intend to sell anything that was obscene, that he believed that the books he received from the distributors were "proper" books, and that the book here involved, and substantially similar books, were sold in all the stores and markets in the community [R. T. 219, 225-227]. There was testimony offered by the prosecution of alleged oral statements made by petitioner to police officers prior to and after arrest. One officer allegedly told the petitioner that the book was filthy when petitioner told the officer he had not read the book [R. T. 170-171]. Another officer testified that petitioner stated he had read a chapter of the book and it was "already filthy" [R. T. 173]. An officer testified that just prior to arrest, petitioner stated that he had read the book and that it was pretty good [R. T. 178] but on the same day after arrest petitioner allegedly stated the book was pretty raw [R. T. 180]. Although petitioner denied the aforesaid testimony of the police officers, petitioner was not cross-examined [R. T. 227], nor was there any rebuttal to his testimony.

Petitioner, citing this Court's decision in *Smith v. California*, 361 U. S. 147, requested the trial court to instruct the jury as follows:

> "If you find that the defendant had a good faith belief that the book in question was not obscene, you must acquit the defendant even if you personally believe that the book is obscene" [A. T. 71].

The trial court refused to give the said requested instruction [A. T. 71].

The petitioner requested the trial court to instruct the jury that in order to establish the offense charged, the evidence must show beyond a reasonable doubt, among other things, that petitioner knew that the book was obscene [A. T. 54]; that if the jury did not find beyond a reasonable doubt that petitioner knew the book to be obscene, the jury should acquit petitioner [A. T. 59, 60, 61, 72, 73], petitioner urging this Court's rulings in *Alberts v. California*, 354 U. S. 476, *Morissette v. United States*, 342 U. S. 246; *Smith v. California*, 361 U. S. 147.

In his summation to the jury, the prosecutor stated:

> "Now, of course, it is not the position of The People that the defendant knew that the material was obscene within the legal definition, because nobody knows that yet until you people decide it, and it would be impossible for the defendant to be in a position to say, unless there had already been a trial on this book." [R. T. 292].[4]

The trial court instructed the jury as follows:

> "You are instructed that so far as the wilful and lewd requirements of the statute in question it is not necessary that the prosecution prove that the defendant, himself considered the matter obscene, but only that he had knowledge of the contents of the matter and that you find as a matter of fact that the matter before you is obscene" [A. T. 34].

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[4] The prosecutor also conceded that the book in question is "not hard-core" [R. T. 342], and that reference to "incest" does not by itself prove "obscenity" [R. T. 342].

(b) The petitioner offered as a witness on his behalf Dr. Norman Fruman [R. T. 227], holder of various degrees from Columbia and New York University and the College of the City of New York [R. T. 227], and at the time of the trial a member of the English Department at Los Angeles State College [R. T. 227-228]. The witness' experience as a literary critic, editor, writer, lecturer and teacher was extensive [R. T. 227-230]. His expertise was not contested [R. T. 252]. Dr. Fruman's detailed testimony demonstrated that the book in question was part of a wide range of current popular literature, was well within the customary limits of candor in the description of sex and did not appeal to the prurient interest of the average person, nor have a corruptive effect upon such reader [R. T. 227-285].

Petitioner also introduced into evidence on the issue of contemporary community standards a group of comparable writings sold generally in the local community [Deft. Ex. A, R. T. 285-287], and another group of comparable material sold in the County of Los Angeles [Deft. Ex. B, R. T. 286-287].

The trial court instructed the jury:

> "If the book sold by the defendant was in fact obscene, judged by its contents, it would not become any less so because other book dealers were selling it, or the public library had copies of it, or literary critics praised it as a work of literary merit, or because other books equally bad were being sold" [A. T. 43].

(c) To prove that the book in question allegedly exceeded "community standards," the prosecution of-

fered two witnesses, the first, a pastor of a church [R. T. 194], and the second, the manager of a corporation, and former member of the "Lakewood Youth Committee" of the "Citizens for Decent Literature" [R. T. 213-A].

The only community with whose standards the witnesses purported to have any knowledge was the "Bellflower-Lakewood area" of Los Angeles County [R. T. 202, 214-H].[5]

The witnesses had no familiarity or knowledge of the prevailing literary standards in the community, or elsewhere [R. T. 204-213, 214-H-214-K]. The witnesses did not know whether the depiction or description of sex in the book in question went beyond comparable descriptions in other contemporary writings sold generally throughout the community. The witnesses purported to testify only with respect to the tastes of the particular groups in the community to which the witnesses belonged and who were concerned with improving the reading material "available for their children," for their "young daughters and sons" [R. T. 214-L].

The prosecution made no attempt to qualify the witnesses as experts with respect to what the community tolerates and generally accepts in the depiction or rep-

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[5]Los Angeles County, with some 73 incorporated cities and 85 unincorporated towns, has a population of 6,395,200. California Roster (1962), 158. The two cities of Bellflower and Lakewood in Los Angeles County have a combined population of 114,029. California Roster (1962) 167,202. The "community" whose standards were purportedly violated has, therefore, about 2% of the population of Los Angeles County (one of 58 counties in the State), and less than 1% of the population of the State. California Roster (1962) 158.

resentation of sex in comparable books or other media of communication [R. T. 200-201, 213-D].

Without specification, the witnesses were asked to give their opinion as to whether the book in question fell below "the community standard" [R. T. 203, 213-C]. The replies of the witnesses, over detailed objections on legal and constitutional grounds [R. T. 198-201, 203, 213-D-214-F], were that the book "fell below" the undefined community standard because the book was not a truthful depiction of how most people lived [R. T. 203-204], and presented at undue length a "sordid picture" of sex [R. T. 214-H].

There is no evidence in the record that the book in question substantially exceeds the limits of candor in the description of sex set by contemporary community standards, or appeals to prurient interest or has any corruptive effect. The uncontradicted record [R. T. 227-286] is to the contrary.

(d) The petitioner requested the trial court to instruct the jury that the offense charged against the petitioner was not established unless the jury found that the book in question had a substantial tendency to deprave and corrupt the average person by arousing lascivious thoughts or lustful desire [A. T. 55, 56, 60, 61, 62, 66, 69].

The trial court refused to give any of the requested instructions on the "corruptive effect" of the writing as an essential ingredient for testing the obscenity of the book. Instead, the trial court erroneously (Appendix A; Appendix B 13) instructed the jury that the legislature of the State had defined the word "obscene" to mean "the appeal" of the book to "prurient interest,"

the trial court reading to the jury the definition of "obscenity" contained in California Penal Code 311, which did not become effective until September 15, 1961. Calif. Stats. 1961, c. 2147, p. 442 [A. T. 35].

The offense charged against petitioner, however, was allegedly committed on May 12, 1961 and the complaint was filed on May 15, 1961. The petitioner was charged with a violation of the then California obscenity law, Penal Code 311.3), authoritatively construed in *People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 961, 178 P. 2d 853 (1947) by the Appellate Department below to define a book as obscene only "if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire." See, *Alberts v. California*, 354 U. S. 476, 486.

The jury returned a verdict of guilty [A. T. 25]. Petitioner was sentenced to pay a fine of $250.00 and an assessment of $12.50, or 50 days in jail [A. T. 28].

(e) On appeal, initially to the Appellate Department and then on transfer to the District Court of Appeal, as aforestated, petitioner claimed that the rulings of the trial court and the judgment of conviction as aforestated deprived petitioner of his liberty without due process of law and abridged the exercise of freedoms of speech and press contrary to the free speech and press and due process provisions of "the First and Fourteenth Amendments" [A. T. 137, 138, 140, 141, 142-145, 149, 151-154, 160, 162-165] in the following particulars:

The statute, as construed and applied by the trial court, to permit conviction of petitioner without proof

that petitioner knew the book in question to be obscene, and to permit petitioner's conviction even if the jury found that petitioner in good faith did not believe the book was obscene, arbitrarily deprived petitioner of his liberty without due process of law and abridged the exercise of freedoms of speech and press [A. T. 162-166].

The statute, as construed and applied by the trial court, to require the jury to exclude consideration of all testimony showing that the book in question was sold by other book dealers, or was in the public library, or had been praised by literary critics as a work of literary merit, or that comparable books were being sold, also deprived petitioner of his liberty without due process of law and abridged freedom of expression [A. T. 151-152].

That in permitting the unqualified and non-expert witnesses to testify that the book was "obscene" in the opinion of the witnesses for constitutionally impermissible and subjective reasons, and in permitting the jury to convict petitioner without any evidence that the book in question exceeded the customary limits of candor or had any corruptive effect or appeal to prurient interest, the uncontradicted record being to the contrary, the trial court construed the statute in such manner to deny petitioner due process of law and abridge his exercise of freedoms of speech and press [A. T. 160-162].

That the book "Fear of Incest" is not obscene and is clearly constitutionally protected expression [A. T. 152-160].

That in failing to instruct the jury on the applicable law with respect to an essential element of the offense,

to wit, the corruptive effect of the alleged obscene book, the petitioner was denied due process of law and the jury unlawfully authorized to convict petitioner for selling a constitutionally protected book, and the jury was also unconstitutionally permitted to convict petitioner upon a charge never made [A. T. 136-141].

(f) The Appellate Department held that the book was "obscene" and not protected "by the first amendment of the U. S. Constitution re freedom of the press" (Appendix B 12). The court held, however, that the trial court erred in instructing the jury on the applicable law; that a correct definition of obscenity under the existing law at the time of the commission of the alleged offense was of the "utmost importance" (Appendix B 13); that the difference between the definition of obscenity after September 15, 1961, and prior thereto, was "important" (Appendix B 13), and that the action of the trial court was "prejudicial error" (Appendix B 13). The Apepilate Department added: "We see no other reversible errors although many are claimed" (Appendix B 13).

(g) On transfer, the court below concurred in the finding of obscenity (Appendix A 7). The court held that the effect of such "literature" is to "erode our moral standards" and tends to bring about "the moral decay of our people" (Appendix A 7). It appeared to the court that the book could be condemned as obscene within the standards for judging obscenity enunciated by Mr. Justice Harlan in "Manual Enterprises, Inc. v. Day" (Appendix A 6).

The court below held that there was no merit in petitioner's complaint relative to the instructions on the

question of lewd intent. It is necessary that it be established that defendant knew the contents of the book but it is not necessary to show that he knew it was obscene" (Appendix A 8).

Pointing to this Court's decisions in *"Smith v. California"* and *"Roth-Alberts,"* the court below held that admission of the testimony of the two prosecution witnesses on "community standards," as aforementioned, did not offend the constitutional standards enunciated by this Court's decisions (Appendix A 8-10). The court below stated that "the question of community standards with respect to asserted obscene writings is somewhat "nebulous in character" and therefore "the opinion of a person who had occasion to explore this question with the people in the area ought to be of some assistance to the jury" (Appendix A 11).

The court below held that the trial court had "inadvertently erred" in giving the definition of obscenity contained in the law after September 15, 1961 (Appendix A 4). It held however, that the error was not prejudicially erroneous (Appendix A 5-6). It appeared to the court below that a book which appeals to "prurient interest" as defined by the trial court necessarily has a "substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire" (Appendix A 5).

(h) The petition for rehearing [C. T. 5] again urged that the statute, "as construed and applied to appellant denied him freedom of speech and press guaranteed by the First and Fourteenth Amendments" and denied "appellant due process of law in violation of the Fourteenth Amendment," and the particulars of the said

constitutional claims were set forth with respect to the non-obscenity of the book in question; the instructions and refusal to instruct on the issues of knowledge and intent; the invalid instructions to the jury to disregard community toleration of the book in question and other comparable books; the infirmities involved in permitting the unqualified prosecution witnesses to render subjective opinions on the alleged obscenity of the writing under the undefined standards of a small local area in one of the counties of the State; the lack of any evidence in the record to show that customary limits of candor were exceeded, and the uncontradicted record that they were not, and the infirmities involved in the trial court's failure to instruct the jury on the applicable law [C. T. 5].

The petition for rehearing was denied [C. T. 6].

(i) The petition for hearing to the California Supreme Court [C. T. 7] again extensively and in similar detail reviewed petitioner's claims that the petitioner's rights to liberty and to freedoms of speech and press "guaranteed by the First and Fourteenth Amendments to the United States Constitution" were abridged and arbitrarily denied without due process of law by the judgment of conviction rendered against petitioner, and that the construction and application of the statute by the courts below rendered the statute unconstitutional under the First and Fourteenth Amendments.

The petition for hearing was denied [C. T. 8].

Reasons for Granting the Writ.

The case herein presents federal questions of substance not heretofore determined by this Court.

1. Petitioner, a bookseller, was convicted under a statute which makes it unlawful for any person to "wilfully and lewdly" sell or keep for sale any "obscene" writing. California Penal Code 311(3). The statute, as construed in the charge to the jury, was defined by the court below to include no requirement of knowledge by petitioner that the writing is obscene. The statute was construed as authorizing conviction of petitioner solely upon proof that petitioner knew the contents of the book in question. The gloss which California places upon the statute is that *mens rea*, or lewd intent, may be inferred from proof alone of knowledge of the contents of a writing. California also construes the statute as meaning that a bookseller's honest but mistaken belief that the contents of the writing were not obscene constitutes no defense to a charge under the statute.

Since this Court "can only take the statute as the state courts read it" (*Terminiello v. Chicago*, 337 U. S. 1), the question presented is whether the statute so construed and applied violates the First and Fourteenth Amendments.

In *Smith v. California*, 361 U. S. 147, this Court held that the strict liability feature of the California ordinance there involved would seriously restrict the dissemination of books which are not obscene, "by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold." *Id.* at 152. The tendency of the ordinance, it was held,

was to erode fundamental freedoms of speech and press by holding a bookseller criminally liable for possessing an obscene book, "wholly apart from any scienter on his part regarding the book's obscenity." *Id.* at 160. It appeared "plain", that the elimination of such a *scienter* requirement tended "to inhibit constitutionally protected expression" and that the ordinance "cannot stand under the Constitution." *Id.* at 155.

To the questions which were left unanswered by *Smith* because unnecessary for decision (*Id.* at 154), California has made reply: California, as aforestated, holds that proof of an accused's knowledge of obscenity is not required and that the evidence of *scienter* required to make prosecutions for obscenity constitutional is only an accused's knowledge of the contents of a writing, from which the jury is permitted to infer a lewd state of mind.* California holds also that honest mistake as to whether the contents in fact constituted obscenity is not an excuse.

On the latter issue, it has been "persuasively suggested" (*State v. Hudson County News Co.*, 35 N. J. 284, 290, 173 A. 2d 20, 23 (1961)) that the same policy which led the Court to impose the scienter requirement in *Smith v. California* warrants acceptance of honest ignorance of the obscene nature of a writing as a con-

*"It is not sufficient to declare that the statute does not make it the *duty* of the jury to convict. . . . The point is that, in such a case, the statute *authorizes* the jury to convict. It is not enough to say that the jury may not accept that evidence as alone sufficient; for the jury may accept it, and they have the express warrant of the statute to accept it as a basis for their verdict. And it is in this light that the validity of the statute must be determined." *Bailey v. Alabama*, 219 U. S. 219, 235.

stitutionally required defense. Lockhart and McClure: Censorship of Obscenity: The Developing Constitutional Standards: 45 Minn. L. Rev. 5, 103-108 (1960); A. L. I. Model Penal Code (Tent. Draft No. 6, 1957) 51; Note, The Supreme Court 1959 Term, 74 Harv. L. Rev. 81, 126-128 (1960). See also, Mueller, On Common Law Mens Rea, 42 Minn. L. Rev. 1043, 1072-1073 (1958).

Professors Lockhart and McClure suggest that "the scienter requirement has not been met if, . . . the seller honestly believed that the book was not obscene." *supra* at 107. The authors state that

> "the character of many books is such that it will be impossible, under evolving constitutional standards, to determine in advance of a judicial ruling whether a book is 'obscene,' even with the best legal advice. To require that a bookseller sell such a book at his peril would constitute a substantial deterrent to the sale of significant literature that is not obscene, for it would result in the very 'self-censorship . . . privately administered' and 'timidity in the face of absolute criminal liability' that the Court sought to avoid by imposing the scienter requirement." *Id.* at 106.[7]

The American Law Institute, even before this Court's decisions in *Roth-Alberts* and *Smith*, expressed the belief that "a possibility of acquittal for honest ig-

[7] "Thus, the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, *which is often separated from obscenity only by a dim and uncertain line.*" Bantam Books, Inc. v. Sullivan, 83 S. Ct. 631, 637. (Emphasis supplied.)

norance should be preserved." *supra* at 51. The Institute added that "retention of this *mens rea* defense will help to preserve a proper conservatism in law enforcement effort in this field." *Id.* at 51. The Institute rejected any "conclusive" presumption of knowledge. *Id.* at 51.

The Harvard Law Review commentator observes that the requirement that the bookseller determine whether the contents of a book are legally obscene makes it likely that the seller will delete from his inventory any book on which there might be a reasonable difference of opinion.

> "since a legal judgment on the issue of obscenity is, at best, difficult to make. Thus, in both situations [the one in *Smith v. California* and the one involved here] the effect of the regulation is to decrease the quantity of reading matter available to the public." *supra* at 127.

The "dim and uncertain line" which separates obscenity from constitutionally protected expression necessarily requires speculation by a bookseller as to when his own application of an obscenity law to a specific writing may be invalid.[8] The burden thus imposed

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[8]What is meant by "obscenity" in particular application is not easy to answer even in the case law. *Times Film Corp. v. Chicago*, 355 U. S. 35, rev'g 244 F. 2d 432 (7th Cir.); *Mounce v. United States*, 355 U. S. 180, rev'g 247 F. 2d 148 (9th Cir.); *One, Inc. v. Olesen*, 355 U. S. 371, rev'g 241 F. 2d 772 (9th Cir.); *Sunshine Book Co. v. Summerfield*, 355 U. S. 372, rev'g 249 F. 2d 114 (D.C. Cir.); *Manual Enterprises, Inc. v. Day*, 370 U. S. 478. See also, *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684; *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488 (S.D. N.Y.) affd. 276 F. 2d 433 (2d Cir.); *People v. Richmond County News, Inc.*, 9

will inevitably discourage the sale of constitutionally protected books and other related media of communication deemed borderline, marginal or otherwise offensive to "those who patrol bookstalls." *Smith v. California*, 361 U. S. 147, 169. This Court has held that a statute affecting free speech and press may be unconstitutional in its entirety if it prohibits "privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct." *N.A.A.C.P. v. Button*, 371 U. S. 415, 432. A statute which deprives an accused in an obscenity prosecution of a defense of good faith belief that the material involved is not obscene would appear to be "susceptible of sweeping and improper application" (*Id.* at 433), a potential deterrent to "constitutionally protected and socially desirable conduct." *United States v. National Dairy Products Corp.*, 83 S. Ct. 594, 599-600. See, Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 540 (1951).

Moreover, the elimination of the defense of honest ignorance of obscenity opens the statute to attack on due process grounds, apart from issues of free speech. To deny one who is accused of "lewdly" selling an obscene book the opportunity to present evidence that he had no such lewd intent is a denial of due process "in the primary sense," the right to be meaningfully heard in one's defense. *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U. S. 673, 681; *Saunders v. Shaw*, 244 U. S. 317; *Hovey v. Elliott*, 167 U. S. 409, 417. See also, *Griggs v. United States*, 298 F. 2d

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N. Y. S. 2d 369, 175 N. E. 2d 681 (1961); *Attorney General v. The Book Named "Tropic of Cancer,"* 184 N. E. 2d 328 (Mass. 1962).

845, 849 (10 Cir. 1962); *Smith v. United States*, 230 F. 2d 935, 939 (6 Cir. 1956).)

The trial court instructed the jury that "it is not necessary that the prosecution prove that the defendant himself considered the matter obscene" [A. T. 34]. Coupled with the court's instruction that a lewd intent can be inferred solely from knowledge of the contents of the matter (and exclusion of a defense of good faith belief that the matter is not obscene), the statute, as construed and applied, requires no proof of an accused's knowledge of the obscenity of the writing which he is accused of wilfully and lewdly selling.

Since a book is not "obscene" unless to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to a prurient interest (*Alberts v. California*, 354 U. S. 476, 489) or has a substantial tendency to deprave or corrupt its readers by exciting lascivious thoughts or arousing lustful desire (*People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 178 P. 2d 853), it is clear that a person who keeps for sale, or sells, a book cannot be deemed to act "lewdly"—with an evil state of mind—unless he knows that the aforesaid ingredients which the law declares to be the crime of obscenity are fulfilled in the book. An *unlawful* state of mind can only rationally be inferred from *guilty* knowledge. Without such *scienter*, an obscenity prosecution is not constitutionally permissible. *Smith v. California*, 361 U. S. 147.[9]

[9]The State courts have interpreted *Smith v. California* "to require the prosecution to plead and prove that the accused knew that the material was obscene. *Demetropolos v. Commonwealth*, 342 Mass. 658, 175 N. E. 2d 259, 262 (1961)".

It is submitted that the trial court here committed fundamental error in charging the jury that the People "were not required to prove an accused's knowledge of the obscene character of a writing. The effect of the charge was to tell the jury that petitioner could be found guilty even though he had no knowledge whatsoever of the obscene character of the book which he was charged with having lewdly sold. In upholding and reiterating such rule, the court below rendered the statute herein unconstitutional.

It is submitted that the State is required to prove an accused's knowledge of the obscene character of the matter he is charged with lewdly keeping for sale. This must be the rule if constitutional protection for freedom of expression is to be maintained. The nature and quality and scope of the evidence necessary to establish such knowledge are quite different problems. The court below confused the constitutional requirement for proof of guilty knowledge with questions of how much proof is necessary to establish such *scienter*. In seeking to minimize evidentiary requirements in an obscenity prosecution, the court below overlooked constitutional limitations and upheld instructions to a jury which permitted conviction even

knowing it to be obscene, indecent or impure;" *State v. Oman*, 261 Minn. 10, 110 N. W. 2d 514, 520 (1961). "'. . . aware of the character of the material;'" *Cohen v. State*, 125 So. 2d 560, 563 (Fla. 1961) ". . . knowledge of the obscene character . . . and . . . the state must prove such knowledge of the accused at the trial;" *State v. Hudson County News Co.*, 35 N. J. 284, 173 A. 2d 20, 23 (1961). ". . . knowledge that the material is obscene." See also, *State v. Sul*, 146 Conn. 78, 147 A. 2d 686, 691 (1958) ". . . knew from its nature that it would have an appeal to prurient interest . . . that the proscribed material is obscene."

without proof of an essential element of the crime charged. (See, *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 492-495.) This was a denial of due process of law. (*Tot v. United States*, 319 U. S. 463, 473. See also, *Speiser v. Randall*, 357 U. S. 513; *Screws v. United States*, 325 U. S. 91, 106-107.)

Finally, the trial court instructed the jury that so far as the wilful and lewd requirements of the statute were concerned, it is only necessary for the prosecution to prove that petitioner had knowledge of the "contents of the matter" [A. T. 34]. The jury was authorized to convict petitioner under the statute if the proof showed only knowledge of the contents, and the jury found the book to be obscene [A. T. 34]. The court below held that "the jury was correctly instructed on this question" (Appendix A 8).[10]

The operation and effect of the method thus employed by the State to purportedly suppress the sale of obscene writings is clearly to curtail the circulation of constitutionally protected material. Since legal judgments on the issue of obscenity are so difficult to make, booksellers "must steer far wider of the unlawful zone" (*Speiser v. Randall*, 357 U. S. 513, 526) and "take off the market those books which they anticipate may give rise to a reasonable difference of opinion regarding obscenity. Yet these are the very books which should be the subject of a judicial determination of ob-

[10]It follows therefore, that a bookseller in California, shown to have read "Lolita," or "Peyton Place," or "The Chapman Report," or "The Carpetbaggers," or "Lady Chatterley's Lover," or "Tropic of Cancer" may be convicted by a jury in the "south-eastern portion of Los Angeles County" (Appendix A 9) on such evidence alone for "wilfully and lewdly" keeping for sale an obscene book.

scenity, without prior private suppression." Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 108 (1960).

Moreover, the statutory presumption here created by the courts below is constitutionally invalid, it is respectfully submitted. It is one thing to argue that evidence is relevant, and therefore admissible, in an obscenity prosecution to show that an accused read a book charged to be obscene. It is however arbitrary to conclude solely from mere knowledge of the contents of a book that the reader knew the book was obscene and kept it for sale with a lewd intent. How arbitrary and irrational such presumption is can be gleaned from the prosecutor's statements to the jury here that it was not the position of the People that petitioner knew the book was obscene, that indeed "it would be impossible for the defendant to be in a position to say, unless there had already been a trial on this book". [R. T. 292]. (See: *Speiser v. Randall*, 357 U. S. 513, 523-524; *Tot v. United States*, 319 U. S. 463; *Manley v. Georgia*, 279 U. S. 1; *Bailey v. Alabama*, 219 U. S. 219; *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, 86. See also, Mr. Justice Stewart in *Rusk v. Cort*, 83 S. Ct. 554, 592-593.

The statute, as thus construed, sweeps within its ambit many constitutionally protected activities, and its very existence results "in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." (*Thornhill v. Alabama*, 310 U. S. 88, 98. See also, *Herndon v. Lowry*, 301 U. S. 242, 261-264.)

It has been stated: "We risk erosion of First Amendment liberties unless we train our vigilance upon the methods whereby obscenity is condemned no less than upon the standards whereby it is judged." (*Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 497.) Is it constitutionally permissible to convict a person in every case for "lewdly" selling an obscene book with no more evidence than the accused knew the contents of the book—and this without any requirement of proof that the accused knew the book was obscene, and without fair opportunity afforded the accused to establish that he had no such guilty knowledge? Are the procedural safeguards for freedoms of speech and press maintained by conclusively presuming *scienter* and *mens rea* from the neutral act of reading a book? The existence of the statute here, as construed and applied, deters the exercise of First Amendment freedoms because it fails to provide the needed "breathing space" essential to their survival. (*N.A.A.C.P. v. Button*, 371 U. S. 415, 433.)[11]

2. The instruction by the trial court that if the book in question was in fact obscene, "it would not become any less so because other book dealers were selling it or the public library had copies of it or literary critics praised it as a work of literary merit, or because other books equally bad were being sold" operated to deprive petitioner of his liberty without due process

[11] See also, *Cramp v. Board of Public Instruction*, 368 U. S. 278, 287-288; *Garner v. Louisiana*, 368 U. S. 157, 205-207; *Marcus v. Search Warrants of Property*, 367 U. S. 717, 729-733; *Talley v. California*, 362 U. S. 60, 65; *Sweezy v. New Hampshire*, 354 U. S. 234, 247-248; *Edwards v. California*, No. 80, October Term 1962, decided February 25, 1963, 31 L. W. 4225, 4227.

of law and to abridge the exercise of freedoms of speech and press, thus rendering the statute as construed unconstitutional.

In *Smith v. California*, 361 U. S. 147, Mr. Justice Frankfurter (at 164-167) and Mr. Justice Harlan (at 171-172) placed their concurrence on an issue raised in that case which the remainder of the Court did not find necessary to decide (at 149, fn. 4). Both Justices agreed that exclusion of all evidence offered in his defense by an accused in an obscenity prosecution to prove that the matter involved did not exceed contemporary community standards was a denial of due process, although Mr. Justice Harlan did not agree that a state court's mere refusal to admit expert testimony, provided other ways of proof were left open, would offend constitutional guarantees.

Clearly, since the "community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates" (*Id.* at 171), a State cannot deprive a defendant of "*all* efforts to enlighten or persuade the trier" (*Id.* at 172). Yet the trial court here by its aforesaid instruction "went to the very heart" (*Yates v. United States*, 354 U. S. 298, 327) of petitioner's defense, and directed the jury to disregard it. The petitioner had offered the testimony of a conceded literary expert and critic, had offered a wide assortment of comparable books sold generally in the community, and had himself testified that the book in question was sold in stores and markets in the community. The trial court instructed the jury in effect that all such evidence was immaterial if the book here involved was obscene. This was fundamental error since under

the Constitution the book in question could not be found obscene if petitioner's evidence was believed by the jury.

The language of the trial court's instruction was taken verbatim from *People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 962, 178 P. 2d 853, rendered before the decision in *Roth-Alberts*. *Wepplo* concededly relied for its language upon *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840 (1945) on this issue (*People v. Wepplo, supra*, at 962). However, in *Attorney General v. The Book Named "Tropic of Cancer,"* 184 N. E. 2d 328, 334 (1962), the Supreme Judicial Court of Massachusetts held that the decision in *Commonwealth v. Isenstadt* was no longer controlling "on constitutional issues."[12]

As construed and applied, the statute herein seriously deprived petitioner of his liberty without due process of law, since it effectively removed from the factfinder consideration of all the evidence offered by petitioner to show that the book in question is not obscene—the very core of the constitutional issue involved in the case. See, *Speiser v. Randall*, 357 U. S. 513.

3. The methods used in the trial herein to prove that alleged obscenity of the book in question and to convict petitioner "involved abuses inimical to protected expression." *Marcus v. Search Warrants of Property*, 367 U. S. 717, 730. The procedures as applied in this case "lacked the safeguards which due process demands

[12] The American Law Institute states: "... a book could hardly be obscene in one county of a state if it appeared openly on public library shelves and in book stores throughout the state." A. L. I. Model Penal Code (Tent. Draft No. 6, 1957) 44.

to assure non-obscene material the constitutional protection to which it is entitled." (*Id.* at 731.)

It was conceded by the prosecutor that the two witnesses upon whom the People relied to convince the jury that the book in question went beyond customary limits of candor in description of sex were not qualified experts in this area. The witnesses themselves admitted that they did not know the extent of community acceptance of the depiction of sex in literature or other related media of communication. Concededly, therefore, the witnesses, whether as "experts" or "lay witnesses," were incompetent to render an opinion on the specific issue involved in the case.

Yet the jury was permitted to render a verdict of guilt based on the opinion of the two unqualified witnesses that the book in question was obscene because it fell below "community standards." What community standards the prosecutor and witnesse were referring to remains "nebulous" in the record, but the replies of the witnesses indicate that the book in their respective opinions was obscene because it described sordid conduct disapproved by a majority of the people, although "there may be a segment of the population that lives like this" [R. T. 203-204].

Moreover, the witnesses were concededly testifying only to the standards of a minuscule community in one county of the State.

The court below erroneously relied, it is submitted, in the first place, upon the concurring opinion of Mr. Justice Harlan in *Smith v. California*, 361 U.S. 147, 171-172 to support its view that incompetent and irrelevant testimony by unqualified witnesses may be used

in an obscenity prosecution to prove that a writing exceeds customary limits of candor in the description or representation of sex. Nothing in Mr. Justice Harlan's opinion suggests approval of such position.

The jury was permitted, secondly, to base their verdict on the opinions of the witnesses that the book offended the standards of propriety and morality of a majority of the people in the Lakewood-Bellflower area. These are not constitutionally permissible standards for judging obscenity. (*Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684, 689; *Mounce v. United States*, 355 U. S. 180; *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 482-491; *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433 (2 Cir. 1960).)

It was also invalid, thirdly, to permit the jury to judge the alleged obscenity of the book by the "nebulous" standards of the "southeastern portion of Los Angeles County" (Appendix 9). See, Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 108-114 (1960); A. L. I. Model Penal Code, §207.10(2) (Tent. Draft No. 6, 1957) 44-45. Compare, *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 488.)[13]

No evidence, finally, apart from the purported testimony of the two witnesses aforesaid, was offered to show that the book in question exceeds customary limits of candor in depiction and representation of sex. The uncontradicted evidence adduced by petitioner proves that the book does not. The judgment of con-

[13]This issue is also raised in *Smith v. California*, No. 832, October Term 1962, now pending on petition for a writ of certiorari in this Court. See Petition 30-32.

viction for obscenity is totally devoid of evidentiary support for the essential elements constituting the offense. (See, *Manual Enterprises, Inc. v. Day*, 370 U. S. 478; *Garner v. Louisiana*, 368 U. S. 157, 163.)

The procedures applied below to obtain such result, as appears from all the aforesaid, lead inevitably to the suppression of constitutionally protected publications. (*Marcus v. Search Warrants of Property*, 367 U. S. 717; *Smith v. California*, 361 U. S. 147; *Bantam Books, Inc. v. Sullivan*, 83 S. Ct. 631.

4. In the constitutional sense, the book in question is not "obscene". "Fear of Incest" by March Hastings, copyright in 1959, and 190 pages in length, bears no illustration except the outside cover. The book is a novel. It is structured. It involves characters in a setting. It has a plot; the characters are dimensional in conflict, and believable. There does not appear to be a single "Anglo-Saxon four letter word" in the book.[14] Although the title of the book uses the word "incest," the book is not about incest, and no incestuous relationship is portrayed. The book, as petitioner's expert witness, Dr. Norman Fruman stated, is like "a truly substantial slice, a vast mass of popular broad audience books" [R. T. 235-236]. "The literary ancestors of a book like this," Dr. Fruman testified, is "the private eye yarn, published by the hundreds, if not thousands, per year" [R. T. 237].

The uncontradicted record shows that an examination of the works of Hemingway, Faulkner, Lawrence, Joyce, Cozzens demonstrates that the book herein is

[14]Compare, *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488, 502 (D.C. N.Y. 1959) aff'd 276 F. 2d 433 (2 Cir. 1960).

well within customary limits of candor. Books clearly accepted by the community such as "Lady Chatterley's Lover," "By Love Possessed," "Hecate County" and "The Carpetbaggers" substantially exceed the book herein in the use of candid language, the number and explicitness of description and variety of sex activities [R. T. 242-250, 260, 271 *et seq.*]. The book herein, taken as a whole "cannot, under any permissible constitutional standard, be deemed to be beyond the pale of contemporary notions of rudimentary decency." *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 489.

Recognizing that a book may not be condemned because deemed "unpleasant, uncouth and tawdry" (Appendix A 6), the court below added that the effect of the book is "to erode our moral standards" (Appendix A 7). It is submitted that it is incompatible with free speech and press guarantees to suppress a communication which portrays a relationship allegedly contrary to the "moral standards" of the community. *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684, 688. While a segment of the population in the opinion of the court below may see "our civilization" in danger of collapsing (Appendix A 7), if such a "detrimental" book is permitted to circulate, clearly these are not sufficient reasons for depriving the writing of constitutional protection.

Liberty of thought extends to "truth, science, morality and the arts in general." *Thornhill v. Alabama*, 310 U. S. 88, 102. The object of the First Amendment freedoms is to avoid "the standardization of ideas either by legislatures, courts, or dominant political or community groups." *Terminiello v. Chicago*, 337 U. S.

1, 4-5. "Progress generally begins in skepticism about accepted truths. Intellectual freedom means the right to re-examine much that has been long taken for granted . . . [and to] dare to doubt what a . . . majority may most passionately assert." Mr. Justice Jackson in *A. C. A. v. Douds*, 339 U. S. 382, 442. If offense to the moral standards or decided opinions of a majority of the citizenry had been the sole test for freedom, "our civilization" would never have read Darwins "Origin of the Species," Freud's "General Introduction to Psychoanalysis" or Havelock Ellis' "Studies in the Psychoanalysis of Sex." (See, *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, and the quotation therein from *Cantwell v. Connecticut*, 310 U. S. 296, 310 (*Id.* at 505, fn. 19).)

5. There is no dispute that the trial court failed to instruct the jury on the applicable law. It is also clear that petitioner requested again and again that the applicable law be charged, without avail. The Appellate Department agreed that all of this was "prejudicial" and "grievous" error sufficient to warrant reversal (Appendix B 13, 15). The court below held that the error was not prejudicial (Appendix A 5-6).

The elementary requirements of due process are not met if a trial court fails to define and explain to a jury the offense charged against an accused. (*Morris v. United States*, 156 F. 2d 525, 528-532 (9 Cir. 1946).) Failure to state the applicable law in an obscenity prosecution clearly undermines procedures intended to guarantee constitutional protection for material which is not obscene. (See, *Smith v. California*, 361 U. S. 147; *Marcus v. Search Warrant of Property*, 367 U. S. 717.)

Only some ten days before the alleged offense was committed and the complaint herein filed, the Appellate Department below held that the definition of obscenity adopted by the court in *People v. Wepplo* was the governing law, to wit, that a book is obscene only "if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire." (*People v. Harris*, 192 Cal. App. 2d Supp. 887, 889, 13 Cal. Rptr. 642 (May 5, 1961).) It was emphasized that this definition had been approved by this Court in *Alberts v. California*, 354 U. S. 476 (*Id.* at 889).

Nevertheless, the trial court refused to define obscenity for the jury as aforesaid, and instead instructed the jury that the standard for judging obscenity was the "appeal" of the writing to "prurient interest," a standard first written into governing law by the legislature at a date months after the commission of the offense and the filing of the complaint. Petitioner appears plainly to have been convicted retrospectively on a charge never made. (*De Jonge v. Oregon*, 299 U. S. 353, 362.)

Contrary to the view of the court below, the "corrupt and deprave" test and the "appeal to prurient interest" test are not the same. It may be that either test, combined with all other essential factors, abstractly considered, meets constitutional requirements discussed in *Roth-Alberts*, but *in fact*, the nature of the appeal of a book is quite different from the effect of a book. A. L. I. Model Penal Code (Tent. Draft No. 6, 1957) 10, 19-22; Mr. Justice Harlan in *Roth-Alberts*, 354 U. S. at 500; Schwartz, Criminal Obscenity Law:

Portents from Recent Supreme Court Decisions, 29 Pa. Bar Assn. Q. 2, 8, 10 (1957).

The court below surmised that a book which appeals to prurient interest necessarily had a substantial tendency to corrupt and deprave. There is no logical support for this view as the "thoughtful studies of the American Law Institute" (*Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 485) demonstrate.

On the other hand, the court below argued that even if the definition of obscenity required to be given was "somewhat more favorable to the defendant than the definition given by the court" (Appendix A 5), still no prejudice was apparent. Plainly, an accused is substantially deprived of a fair trial if the court fails to charge the applicable law "more favorable" to the accused than the law erroneously charged. Moreover, it is the corruptive effect "element" which is of major significance in any obscenity prosecution for it is that "characteristic which makes an obscene publication criminal." *Manual Enterprises, Inc. v. Day*, 370 U. S. 478.

Finally, the court below opined that the jury would not have acted differently "had the challenged instruction not been given and the requested instructions on the definition of obscenity" given (Appendix A 7). But whether or not a book has a tendency to "corrupt" or "debase" the average person is not easily answered. See Judge Frank, concurring in *United States v. Roth*, 237 F. 2d 796, 812 (2 Cir. 1956). This issue was initially for the factfinder to decide, and the petitioner was entitled to the jury's ruling on the issue. (See, *Commonwealth v. Moniz*, 336 Mass. 178, 143 N. E. 2d 196 (1957), and the same case, 338 Mass. 442, 155 N. E. 2d 762 (1959).)

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

STANLEY FLEISHMAN,
Counsel for Petitioner.

Of Counsel,
SAM ROSENWEIN.

APPENDIX A.

Opinion and Judgment of District Court of Appeal.

(Title of Court and Cause)

Crim. No. 8432

Appeal from judgment of the Municipal Court of Los Cerritos Judicial District on transfer from the Appellate Department of the Superior Court of Los Angeles County. John C. Landis, Judge. Affirmed.

Brock and Fleishman for Appellant.

William B. McKesson, District Attorney, Harold M. Stanley, Harry Wood, Ralph F. Bagley, Deputy District Attorneys, for Respondent.

Defendant was convicted of violating section 311.3 of the Penal Code (selling an obscene book). The case comes to this court on the certification of the Appellate Department of the Los Angeles County Superior Court.

The alleged offense was committed on May 12, 1961. Section 311 provides that "Every person who wilfully and lewdly . . . 3. . . . sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper or book; . . . 6. . . . is guilty of a misdemeanor." Following a jury trial in the Municipal Court of the Los Cerritos Judicial District, defendant was convicted. The appellate department reversed the judgment of conviction on the theory that the court had erroneously and prejudicially instructed the jury with respect to the definition of obscenity.

The defendant contends that "as a matter of law and fact, the book, *Fear of Incest*, is constitutionally protected expression"; that it is protected by the free-

doms of speech and press. This thesis is based upon the premise that the book is not obscene under a proper definition of that term for it has been held that "obscenity is not protected by the Constitution." (*Aday v. Superior Court*, 55 Cal. 2d 789, 799; *Roth v. United States* and *Alberts v. State of California*, 354 U. S. 476, 481, 486.) In the latter cases the court stated: "We hold that obscenity is not within the area of constitutionally protected speech or press." (P. 485.) In *Aday*, our Supreme Court pointed out (p. 798) that "recently the United States Supreme Court defined obscene material as that which deals with sex in a manner appealing to prurient interest; . . . and adopted . . . the test 'whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.'" (*Roth and Alberts, supra.*) On this point *In re Harris*, 56 Cal. 2d 879, states (p. 880): "The standard for judging obscenity adequate to withstand the charge of constitutional infirmity is whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest. [Citations.]"

In *People v. Wepplo*, 78 Cal. App. 2d Supp. 959, the court stated (p. 961): "A book is obscene 'if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire.' [Citations.]" This definition was approved in the *Roth-Alberts* case, *supra*. As pointed out in *Wepplo*, then the question whether a particular book is obscene is primarily one of fact. Absent an erroneous and prejudicially misleading definition of obscenity, we cannot upset the jury's determination that this book

was obscene unless we can say, upon consideration of the book in its entirety, the jury could not reasonably reach such a conclusion. (*People v. Wepplo, supra.*)

It thus becomes important to examine the instructions on this point. The court, on its own motion, gave the following instruction:

"The legislature of our state has defined the word 'obscene' as it applys [sic] to this case in the following language:

"Obscene means that to the average person, applying contemporary standards, the predominant appeal on the book taken as a whole, is to prurient interest, that is a shameful or morbid interest in nudity or sex which goes substantially beyond customary limits of candor in description or representation of such matters and is a book which is utterly without redeeming social importance."[1]

The court declined to give defendant's proposed instruction to the effect that if the jury did not find, beyond a reasonable doubt, that the predominant theme of the book, taken as a whole, has "a substantial tendency to deprave or corrupt the average person by arousing lascivious thoughts or lustful desires" they should find him not guilty.

The court also declined to give another instruction proposed by defendant to the effect that if the jury did not find beyond a reasonable doubt that the book, "applying contemporary community standards, appeals to the prurient interest of the average person" they should find the defendant not guilty.

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[1]This definition of "obscene" is in harmony with *Roth* and *Alberts*, and *Aday, supra*. These cases were decided prior to the sale of the book here in question.

In advising the jury that the legislature had defined obscenity as stated in the quoted instruction, the trial court inadvertently erred in that the legislative definition of obscenity was incorporated into an amendment of section 311, Penal Code, at the 1961 session of the legislature which, however, did not become effective until the following September 15, which was some four months after the commission of the alleged offense. Defendant argues that to give this instruction was not only error but prejudicial. He contends that the court should have instructed in accordance with the definition of obscenity in *People v. Wepplo, supra*, and approved in the *Roth-Alberts* cases.

It is suggested that the court's erroneous statement that the word "obscene" had been defined by the legislature would cause the jury to give undue weight to it. We do not find any merit in this idea. The important thing is that the jury was told that the definition represented the law of the state and was the yardstick that they should apply in determining whether *Fear of Incest* was or was not obscene.

While it would not have been improper to have given the definition of obscenity that is quoted above from *People v. Wepplo, supra*, 78 Cal. App. 2d Supp. 959, 961, it does not appear to us that it was prejudicial to the defendant for the court to define "obscene" as it did, for the predominant idea in the two definitions is substantially the same, although couched in different language. The definition given by the court has the merit of being more comprehensive in that it provides that contemporary standards must be applied in determining whether a particular production was obscene. It is true that under the Wepplo definition a book is

obscene "if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire." The instruction that was given says that a book is obscene if, applying contemporary standards, its predominant appeal to the average person is to prurient interest which is defined as "a shameful or morbid interest in nudity or sex which goes substantially beyond customary limits of candor in description or representation of such matters" and the book is "utterly without redeeming social importance." When this latter definition is analyzed, it leads to the reasonable conclusion that a book which is obscene under that definition would have a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire. Thus, there is no substantial difference between the two definitions except that the one given by the court was more comprehensive, precise and realistic. On this point it is stated in note 20 to the *Roth* and *Alberts* cases, *supra* (p. 487): "We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A. L. I. [American Law Institute], Model Penal Code, § 207.10(2) (Tent. draft No. 6, 1957)". The definition of obscenity that the trial court gave in the instant case is substantially the same as that developed by the American Law Institute (See A. L. I. Model Penal Code §251.4(1) (Proposed Official Draft, 1962.))

Even if it should be conceded that the *Hoppe* definition of an obscene book (so far as it goes) is somewhat more favorable to the defendant than the definition given by the court, it does not necessarily follow that this was prejudicial error justifying a reversal.

Article VI, section 4½ of the Constitution provides: "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

In *People v. Watson*, 46 Cal. 2d 818, 836, the Supreme Court examined this constitutional provision and came to the conclusion that "a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."

In order to apply this principle properly it is necessary for us to make some brief reference to the character of the writing "taken as a whole" here under consideration. One of the judges of the appellate department of the Superior Court in a concurring opinion provides a fair summary, characterizing the book as containing a "series of wanton, offensive sexual acts of erotic and perverted consummations, of variegated means of accomplishment. . . ." He describes it as not only "dismally unpleasant, uncouth and tawdry" which, however, is not sufficient to make it obscene under *Manual Enterprises, Inc. v. Day*, . . U. S. . . , 8 L. ed. 2d 639, 648, but he further states "It is both patently offensive and full of prurient interest appeal. Its repetitive, vivid and minutely descriptive portrayals of the sex acts between those of opposite and the same sexes, left little to the imagination, and that little built up and culminated in a constant stream of prurient in-

terest appeal. It could not and did not have any different purpose or effect, and in its sordid detail transcended the prevailing bounds of decency . . .". We might add that the book described a series of sexual debaucheries which could have no effect other than a "substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire" and that the book is utterly without redeeming social importance."

The effect of such "literature" is to dull the moral sensitivity of many, if not most, of the people who read it. It serves to erode our moral standards and tends to bring about the moral decay of our people. If the time ever comes when the average person, applying contemporary standards, does not look upon such a book as detrimental to the public welfare, it will be a signal that our society has deteriorated to a low level and that our civilization is in danger of collapsing as other civilizations have in the past which have overindulged their appetites and cast aside decent standards of behavior.

In view of the character of the book taken as a whole and the debasing effect it is likely to have upon its readers, it does not seem reasonably probable that a result more favorable to defendant would have been reached had the challenged instruction not been given and the requested instructions on the definition of obscenity had been given. It therefore cannot be said that the challenged instruction resulted in a miscarriage of justice. (*People v. Watson, supra*, 46 Cal. 2d 818.)

There is no merit in defendant's complaint relative to the instructions on the question of lewd intent.

It is necessary that it be established that defendant knew the contents of the book but it is not necessary to show that he knew it was obscene. Here the evidence disclosed that defendant was informed that the book was "filthy". Thereafter, he stated he had read part of it, and found it pretty bad. He then read the book. He ordered more copies and was selling them at the time he admitted that he had read the book. It having been established that defendant had read the book and therefore had knowledge of its character, the jury could infer from such knowledge a lewd intent on the part of defendant. The jury was correctly instructed on this question.

In *Smith v. California*, 361 U. S. 147, Mr. Justice Frankfurter (in his concurring opinion at page 165) stated "It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of 'contemporary community standards.'" This principle has previously been recognized in the *Roth-Alberts* case, *supra*, 354 U. S. 476, and the *Alday* case, *supra*, 55 Cal. 2d 789. The People sought to assist the jury in this area by producing two witnesses. One was Dr. Daniel Haeger Fiystra who was pastor of the Bethel Reform Church in Bellflower, which is in the general locality where the book was sold. He also conducted weekly radio broadcasts. Through his church affairs and through his broadcasts, he is in contact with a great many people in the community and is thus aware of the community standards of decency. He had read *Incest*. In his opinion, the book falls far below the

standard of the community and far below the generally accepted standards of most people.

The other witness was William E. Daley, who is a Project Manager at Western Gear Corporation, who lives in North Long Beach. He was on the Lakewood Youth Committee and conducted its first few meetings. At these meetings, they had speakers in an effort to accomplish something toward banning pornographic and immoral books from the news stands. There were around 100 people present at the first of these meetings. There were representatives from the parent-teacher groups, women's clubs and other local organizations. Mr. Daley was also a member of a Committee of Lakewood Citizens for Decent Literature. He said the books brought before this committee were very mild compared to this book. Mr. Daley was aware of the community standards of decency because he had been interested in and worked in that field, and because he had lived in that general area all of his life. He also had read the book, *Fear of Incest*. In his opinion, the book falls below the community's standards. He said that the only excuse for the book is to present a sordid picture of sex, that it was just an excuse to write about sex in a very descriptive way. His acquaintance in this field was, generally, in the southeastern portion of Los Angeles County.

Defendant contends that Dr. Flystra and Mr. Daley were not competent to give testimony on community standards. On this point, Justice Harlan in *Smith v. California*, *supra*, 361 U. S. 147 (in his concurring and dissenting opinion at page 172) pointed out that "While a State is not debarred from regarding the

trier of fact as the embodiment of community standards, competent to judge a challenged work against those standards, it is not privileged to rebuff *all* efforts to enlighten or persuade the trier of fact:

"However, I would not hold that any particular kind of evidence must be admitted, specifically, that the Constitution requires that oral opinion testimony by experts be heard. There are other ways in which proof can be made, as this very case demonstrates. Appellant attempted to compare the contents of the work with that of other allegedly similar publications which were openly published, sold and purchased, and which received wide general acceptance. Where there is a variety of means, even though it may be considered that expert testimony is the most convenient and practicable method of proof, I think it is going too far to say that such a method is constitutionally compelled, and that a State may not conclude, for reasons responsive to its traditional doctrine of evidence law, that the issue of community standards may not be the subject of expert testimony. I know of no case where this court, on constitutional grounds, has required a State to sanction a particular mode of proof."

Professor Wigmore suggests that the criteria for receiving opinion evidence is: "Can a jury from this person receive appreciable help?" (7 Wigmore on Evidence, §1923.) It would seem that the broad contacts of Dr. Flystra and the active interest of Mr. Daley in this particular field and his explorations with respect to community standards in that area were such that a jury could receive appreciable help from them on the question at issue. In this connection, it should

be observed that the discretion of the trial judge in receiving such evidence is very broad. Also, it is apparent that the question of community standards with respect to asserted obscene writings is somewhat nebulous in character. Therefore, the opinion of a person who has had occasion to explore this question with the people in the area ought to be of some assistance to the jury. Any question as to the extent or reliability of their knowledge in this field goes to the weight of their testimony rather than to its admissibility. (*People v. Penny*, 44 Cal. 2d 861, 866; *People v. Symons*, 201 A. C. A. 917, 924.) We therefore conclude that the trial court did not abuse its discretion in permitting these two witnesses to testify with respect to community standards in this case.

The judgment of conviction is affirmed.

Fox, P. J.

We concur:

Ashburn, *J.*

Herndon, *J.*

APPENDIX B.

Opinion and Judgment of Appellate Department.

(Title of Court and Cause)
Superior Court No. CR A 5053
Trial Court No. M 14038

MEMORANDUM OPINION AND JUDGMENT

Appeal by defendant from judgment of the Municipal Court of the Los Cerritos Judicial District, John C. Landis, Judge. Judgment reversed; cause certified to D. C. A.

For Appellant—Brock and Fleishman.

For Respondent—William B. McKesson, District Attorney; Harry Wood, Deputy District Attorney; Ralph F. Bagley, Deputy District Attorney.

The defendant was convicted of selling an obscene book in violation of Pen.C 311 subsec. 3. He appeals from the judgment. The complaint alleges that the misdemeanor was committed on a date prior to the time the 1961 amendment of that section went into effect. It is undisputed that obscenity is not protected by the first amendment of the U. S. Constitution re freedom of the press. The evidence supports the implied finding that the book was obscene. This court has no intention of contributing to the moral decay of America by protecting obscenity but the judgment must be reversed because the court erred in instructing the jury as to the definition of obscenity. The definition of that term is a matter of law. Whether a book comes within that definition is usually a question of

fact and one which is not without difficulties. It is, therefore, of utmost importance that the court give the jury an instruction which correctly defines obscenity as it stood at the time the book was sold. The court, however, instructed the jury in the language of the 1961 amendment. The difference between that and the law prior to the amendment is important. A part of the former definition was that a book is obscene if it has "a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires." This was approved in *Alberts v. California* (1957) 354 U. S. 476, 486, 1 L. ed. 2d 1498, 1508. The definition which the court gave omitted all mention of "a substantial tendency to deprave or corrupt its readers" (see instruction No. 5 apparently given on the court's own motion). This was prejudicial error. We see no other reversible errors although many are claimed. This is a case which we shall certify to the District Court of Appeal.

The judgment is reversed.

Dated: July 18, 1962.

Swain, Presiding Judge

I concur in the foregoing and add the following opinion. P.C. 311.3—as it stood on May 12, 1961, the date of the charged misdemeanor, insofar as it applies here, inveighed against "every person who wilfully and lewdly . . . sells . . . . any obscene or indecent writing, paper, or book . . ." "Fear of Incest",

the book sold by appellant, in question here, viewed as a whole is not only "dismally unpleasant, uncouth and tawdry" in its series of wanton, offensive sexual acts of erotic and perverted consummations, of variegated means of accomplishment, having only a small relationship to the book's title. Not only is it dismally unpleasant, uncouth and tawdry which *Manual Enterprises v. Day* (June 25, 1962) .... U. S. ...., ... L. ed. 2d ...., No. 125-October Term, 1961, 30 U. S. Law Week 4490, states "is not enough to make them [it] obscene" [brackets ours], it also appeals to prurient interest. Under the federal statute there acted upon, the postal law, two distinct elements were required to be proved: "(1) patent offensiveness and (2) 'prurient interest' appeal." Under that statute the relative community standard of decency was held to be a national standard of decency, since the statute reached to all parts of the United States.

From a reading of the book as a whole in our case we cannot say that the jury's finding that the book was obscene or indecent was in any sense contrary to the evidence. It is both patently offensive and full of prurient interest appeal. Its repetitive, vivid and minutely descriptive portrayals of the sex acts between those of opposite and the same sexes, left little to the imagination, and that little built up and culminated in a constant stream of prurient interest appeal. It could not and did not have any different purpose or effect, and in its sordid detail transcended the prevail-

ing bounds of decency and the jury so found. Its finding should not be negatived on appeal unless there was prejudicial error in the case.

Were it not for instruction No. 5, given on the court's own motion apparently, the record presents no reversible error. (See R. p. 360.) Had the instruction not contained the wording: "The legislature of our state has defined the word 'obscene' as it applies to this case in the following language; . . .", the instruction would have been in accordance with the case law with possibly one exception. In *Roth v. U. S.* (1957) 354 U. S. 476, 1 L. Ed. 2d 1498, at 1507, we read: "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties. . . ." Thus that portion of the instruction which ends with the wording: ". . . and is a book which is utterly without redeeming social importance" is in accordance with *Roth*. However, in informing the jury that the legislature has defined the word "obscene" as set out in the instruction, was telling the jury that it could rely upon the California legislature's definition contained in a law not effective until September 15, 1961; more than four months after the date of the offense charged, i.e., May 12, 1961. This was error, and grievous error, since the jury undoubtedly could have given great weight to the legislative definition, one which the jury was not entitled to give to it.

It was also error to fail to give appellant's requested instruction, especially No. 9. In *People v. Wepplo* (1947) 78 Cal. App. 2d Supp. 959, 961, the court adopted the definition of obscenity as follows: "A book is obscene 'if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire.'" This was approved by the U. S. Supreme Court in *Alberts v. California* (1957), 354 U. S. 476, 1 L. ed. 2d 1498, 1508. See *People v. Harris* (1961) 192 Cal. App. 2d Supp. 887, 889. Appellant was entitled to this instruction. Had it been given, the jury probably would have found appellant guilty, for the book has the "substantial tendency to deprave or corrupt its readers," as in the *Wepplo* definition. However, we cannot surmise as to the effect of the instruction based on the *Wepplo* decision had it been given. The fact is it was not. Its refusal was prejudicial error. I agree that we should certify to the D. C. A. The judgment should be reversed.

Huls, Judge.

APPENDIX C.

Order Certifying Cause to District Court of Appeal.

(Title of Court and Cause)
Superior Court No. CR A 5053
Trial Court No. M 14038

The above-entitled cause involves important questions of law which should be settled. Therefore it is hereby certified on our own motion to the District Court of Appeal.

The judgment of this court was filed July 18, 1962. It reversed a judgment adjudging the defendant guilty of selling an obscene book in violation of Pen. C. 311, subsec. 3. This court held that the book was obscene but that the trial court committed prejudicial error in instructing the jury as to the definition of "obscene." This court seeks the opinion of the District Court of Appeal on both points.

Dated: July 18, 1962.

By the Court:
Swain, Presiding Judge
Huls, Judge.

APPENDIX D.

Order Granting Transfer on Certification.

(Title of Court and Cause)

Division Two

Cr. A No. 5053

2nd Crim. No. 8432

By the Court: The appellate department of the Superior Court of Los Angeles County having certified that a transfer of the appeal in the above-entitled action to the District Court of Appeal appears necessary to settle important questions of law, and good cause appearing therefor, the appeal from the Municipal Court of the Los Angeles Judicial District in and for the County of Los Angeles, now pending in the appellate department of the Superior Court of the County of Los Angeles and numbered Cr. A 5053 therein, is hereby transferred to the 2nd District Court of Appeal, Division Two. The appeal is calendared for oral argument before this court on September 6, 1962 at 1:30 p.m.

Fox, J.

Dated August 6, 1962

APPENDIX E.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. California Penal Code, §311, prior to September 15, 1961, provided in pertinent part as follows:

> "Every person who wilfully and lewdly, either:
>
> * * * * * *
>
> "3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; . . . is guilty of a misdemeanor."

4. California Penal Code, §311, effective September 15, 1961, provides in pertinent part as follows:

"As used in this chapter:

"(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance. . . ."